

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 108  
5394400

BETWEEN                      ELIZABETH HYLAND  
   Applicant  
  
A N D                              AIR NEW ZEALAND  
   LIMITED  
   Respondent

Member of Authority:      Alastair Dumbleton

Representatives:           Paul Wicks, counsel for Applicant  
   David France, counsel for Respondent

Investigation Meeting:      18 March 2013

Date of Determination:      28 March 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.      Air New Zealand Limited acted without justification and to the disadvantage of Elizabeth Hyland at the time it gave her a final warning. For that reason she has a personal grievance.**
- B.      The final warning is of no effect and shall not be taken into account by Air New Zealand. Ms Hyland is not required to attend Anger Management training as instructed. She is to sign the letter of apology previously written by her and it is to be given to the intended recipient.**
- C.      Ms Hyland contributed to the situation that gave rise to her personal grievance. No award of compensation is made for humiliation and distress.**
- D.      Costs are reserved.**

**Employment relationship problem**

[1] The Authority has investigated a personal grievance claim brought by Ms Elizabeth Hyland against her employer Air New Zealand Ltd.

[2] To resolve the grievance Ms Hyland seeks from the Authority a declaration that Air New Zealand acted without justification and to her disadvantage when it gave her a final warning. Ms Hyland seeks compensation of \$10,000 for hurt feelings and humiliation, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[3] In conjunction with the warning she received Ms Hyland was also required by Air New Zealand to undertake three sessions of Anger Management training, a disciplinary measure she challenges as well.

**San Francisco tour of duty**

[4] The grievance claim arose from the following circumstances. Ms Hyland has been employed by Air New Zealand for many years as a Flight Attendant on international flights. On 27 August 2011 she was a member of the cabin crew of a B747 aircraft flying overnight from Auckland to San Francisco. Cabin crew on this flight of about 12 hours duration are allowed a break from their duties to sleep or rest in a facility provided on the aircraft. It has a number of beds or bunks in it for that purpose.

[5] When it became time for her to resume duty at the end of the rest break taken by Ms Hyland, she had to be woken from sleep. The physical contact used to wake her up applied by a colleague flight attendant caused physical hurt or discomfort to Ms Hyland and agitated her considerably. Upon returning to duty in the cabin she confronted her colleague about the way she had been woken.

[6] To demonstrate what she had experienced Ms Hyland took hold of her colleague's arm and shook it, while asking her to understand how it had felt to be woken up with the force she claimed had been applied to her. Ms Hyland's remonstrations and physical actions caused her colleague immediate distress.

[7] The confrontation quickly came to the attention of the Flight Services Manager (FSM), the senior member of the cabin crew. During the flight the FSM called a meeting of Ms Hyland and her colleague, and an Inflight Service Co-ordinator (ISC) was also present as a witness.

[8] The FSM considered the problem between Ms Hyland and her colleague was resolved at the meeting. In a report of the incident she sent on 29 August 2011 to a Performance and Development Manager (PaDM) the FSM said that at the meeting Ms Hyland and her colleague had discussed what had happened and that Ms Hyland had apologised to her colleague for her actions. The FSM in her report said of the meeting, “all present were satisfied with the outcome as I understand the case to be.” The FSM also mentioned that later on at a crew de-briefing at San Francisco after the flight had ended, Ms Hyland had made a comment about the incident in the presence of her colleague. She noted that “some other crew thought this remark was negative in light of the previous incident between these two parties”.

[9] The FSM advised in the report sent to her manager “this is to let you know I consider this matter over and closed by all parties.” She concluded by asking for an opportunity to discuss the incident with a PaDM after returning to Auckland at the end of the tour of duty.

[10] The PaDM who received the FSM’s report considered the matter to be serious, as it appeared Ms Hyland had physically harmed her colleague and afterwards had engaged in further unwelcome conduct, verbally and with body language. Consequently for safety reasons the PaDM requested that Ms Hyland be stood down from duty for the return flight to Auckland and be required to passenger home instead. At the same time, before Ms Hyland had departed from San Francisco, the PaDM expressed concern that Air New Zealand needed to send a clear message that her behaviour was not acceptable.

[11] Upon returning to her Auckland base Ms Hyland took part as requested in an investigation commenced and conducted by Air New Zealand management personnel. She was represented by a solicitor in the inquiry, which became a protracted one.

[12] The airline gathered information from flight attendants who were on the tour of duty during which the incident took place. Ms Hyland was advised that depending on the outcome of the investigation, disciplinary action could be taken against her up to and including termination of her employment. She attended meetings to give her explanation of events under investigation.

[13] Eventually Ms Hyland was presented with a comprehensive report by a PaDM, Ms Karen Eppingstall, which gave the findings made by Air New Zealand from its investigation.

[14] In the report Ms Eppingstall concluded that Ms Hyland's actions towards her colleague during the flight to San Francisco and afterwards in that city before returning to New Zealand, were in breach of the following:

- *The Company's Code of Conduct in relation to treatment of other employees where employees are expected to treat colleagues with respect and integrity and mutual trust.*
- *The standards expected of Flight Attendants as set out in the Cabin Crew General Operating Procedures Manual clause 1.3.17 – 18; where under the direction of the Senior Flight Attendant, this role is responsible for the safety and welfare of customers and other crew members.*
- *The Company's Workplace Bullying Policy.*

[15] Ms Hyland was advised that the version of events surrounding the incident she had given was not considered to be credible and that her conduct and behaviour had been inappropriate and unacceptable and in breach of the Code of Conduct, Cabin Crew Procedures Manual and Workplace Bullying Policy.

[16] In her report Ms Eppingstall reserved the airlines decision as to what action would be taken to address Ms Hyland's "serious misconduct" as her actions had been found to be. Dismissal was advised to be a possible outcome.

### **Disciplinary action**

[17] The action decided upon was confirmed three days later by letter to Ms Hyland.

[18] Ms Eppingstall advised Ms Hyland that she was found to have approached her colleague "in an aggressive manner and made inappropriate contact with her arm causing pain and distress," and also that "subsequently you apparently made further unwelcome and aggressive approaches ... both on the aircraft and while on the tour of duty." Ms Hyland was advised that her actions were in breach of the employer's policies and that cumulatively her actions amounted to serious misconduct.

[19] Ms Eppingstall further advised that because Ms Hyland had offered to give a written apology to her colleague and because of her acknowledgement that she should

not have touched her colleague, and also because she had undertaken not to repeat her actions, the decision had been made to issue Ms Hyland with a final warning to be placed on her personnel file.

[20] Ms Hyland was advised that she was to submit her written apology for review to Ms Eppingstall who would pass it on to the flight attendant concerned.

[21] As a further outcome of its investigation Air New Zealand also instructed Ms Hyland to attend, in her own time, three sessions of Anger Management training. This was to be given by the airline's EAP service provider and there was no suggestion that Ms Hyland would have to pay for the training herself.

[22] To date Ms Hyland has not undertaken the required training as she considers it is not appropriate to do so until the grievance she raised about the final warning and instruction is resolved. She advised the Authority that if the warning and instruction are found to be justifiable then she will have to comply with them.

[23] Ms Hyland submitted a draft apology to Ms Eppingstall but it has not been forwarded to her colleague for whom it was intended, as when she read it Ms Eppingstall became concerned as to the genuineness of the apology.

### **Application to Authority**

[24] Ms Hyland applied to the Authority in September 2012 to have her personal grievance investigated, stating that the problem she wished to have resolved was a claim of unjustifiable disadvantage pursuant to s 103(1)(b) of the Employment Relations Act. She stated that she had been subjected to a long investigation regarding the incident in question which had resulted in a final warning. She considers the conduct of the investigation was flawed and the outcome of it was unjust, and consequently the issue of the final warning constituted an unjustifiable disadvantage to her.

[25] Ms Hyland in her application requested orders from the Authority requiring Air New Zealand to remove her final warning and withdraw the instruction to attend Anger Management training, and also an order that further apologies to her colleague are unnecessary. She seeks acknowledgement of the workplace injury she claims was suffered from the way she was awoken. She sought \$25,000 as compensation under s 123 of the Act for distress and humiliation. Also, a penalty was sought by Ms Hyland

for breach of the collective agreement under which she was employed, an award of legal costs and payment of the application fee of \$71.56.

### **Amendment of claim**

[26] Shortly before the investigation meeting, through counsel Mr Wicks, the statement of problem was amended to a claim that the final warning was unjustified for the following reasons;

- The factual findings made by Air New Zealand did not disclose in all the circumstances serious misconduct;
- The findings made by Air New Zealand and the circumstances arising did not justify a final written warning being issued;
- Air New Zealand was not justified in requiring, as a disciplinary outcome, attendance by Ms Hyland at Anger Management training.

[27] The amended remedies sought were:

- (1) A determination that the factual findings made by Air New Zealand did not constitute serious misconduct justifying a final written warning;
- (2) Compensation of \$10,000 for hurt and humiliation under s 123(1)(c)(i) of the Employment Relations Act;
- (3) Legal costs.

[28] At the investigation meeting the Authority heard evidence, which was cross examined by counsel Mr Wicks and Mr France, from Ms Eppingstall and Ms Rachel Chapman, Human Resources Consultant of Air New Zealand, and from Ms Hyland. Submissions were made by counsel at the conclusion of the evidence.

### **Test of justification**

[29] The test at s 103A of the Employment Relations Act must be applied by the Authority to determine Ms Hyland's personal grievance. Under that test the question of whether an action by an employer was justifiable must be answered by considering the employer's actions and how the employer acted and by deciding whether they

were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[30] In applying s 103A the Authority must also consider four particular factors set out at s 103A(3), as well as any others it may think appropriate. The test of justification is to be applied with the proviso or qualification that a dismissal must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly.

### **Delay in concluding investigation**

[31] The critical point in the s 103A test for considering the circumstances of the employer's action is "at the time the action occurred."

[32] What has concerned the Authority most in determining this grievance is the length of time that elapsed between the conduct of Ms Hyland that led to a disciplinary inquiry and the conclusion of that inquiry with the issue to her of a final warning and instruction to attend Anger Management training.

[33] Nearly 10 months went by between Ms Hyland's tour of duty to San Francisco on 27-30 August 2011 and the giving to her of the final warning on 18 June 2012.

[34] There is no dispute that in principle a final disciplinary warning can give rise to a claim of unjustified action causing disadvantage to an employee. There may be circumstances where a long delay in concluding an investigation will of itself disadvantage an employee in some way, but this is not a case where the passage of time taken to investigate conduct is being challenged as unjustifiable. This is a case where particular action of the employer taken after a lengthy time in response to an employee's conduct is claimed to be unjustifiable and to have caused disadvantage to the employee.

[35] There are two matters in particular that give rise to the Authority's concerns about the protracted inquiry carried out in this case. First, after Ms Hyland returned to New Zealand and the investigation had started in late August or early September 2011, she was able to resume normal duties and appears to have carried on with her usual work throughout the 10 month period of the investigation. There is no suggestion that during that time anything untoward in her conduct or behaviour again occurred while working for the airline.

[36] Ms Hyland's lawyer wrote to Air new Zealand in May 2012 protesting that the unreasonable delay in concluding the investigation (by then 8½ months long) was unfair to Ms Hyland and had caused her unnecessary stress and health issues. It does seem unfair and unreasonable and to possibly have an element of punishment about it, although unintended, to have an employee continue to work for as long as 10 months while under the shadow of an unfinished disciplinary investigation which has been notified as possibly leading to dismissal. That situation may lead to an employee not being fully able to concentrate on their work, which in this case involved rigorous tours of duty and work being performed in a safety sensitive environment.

[37] In my view, objectively, a fair and reasonable employer could not have considered that after 10 months there was any longer a purpose to be achieved by giving a final warning for what must be regarded as historical conduct after a period that long had gone by since it occurred, and during which period the employee had demonstrated there was no further problem of the same or any other kind with her behaviour or performance. To be responsive as an employer required Air New Zealand to conclude its disciplinary investigation of an unsuspended employee much more quickly.

[38] The second relevant matter, one that Air New Zealand took into account, was that Ms Hyland is a very long serving employee of some 26 years working as a flight attendant and mostly for the international airline. Apart from a single instance of conduct which had earlier resulted in a warning, but for conduct dissimilar or unrelated to the August 2011 occurrence, Ms Hyland has had an unblemished career with her employer.

[39] With one reservation I do not consider that there was any flaw in the investigation and disciplinary process itself in terms of the factors at s 103A(3) of the Act. The single issue I have is that in fairness to Ms Hyland the ISC should have been asked to make a statement about what happened during the inflight meeting called for by the FSM, as it was alleged that Ms Hyland refused to be seated and stood over her colleague in the small room on the aircraft in which the meeting took place. As the employer was investigating allegations that Ms Hyland had acted in a hostile, intimidatory or aggressive manner the ISC was a material witness whose account of events at the meeting should have been sought.

[40] The general procedure in this regard was referred to by Mr Lee Barrett, the PaDM who commenced the investigation, when he advised during an interview of witnesses on 17 February 2012 that Air New Zealand had a standard process to follow. He said it was the essence of a fair and transparent process that to form a view Air New Zealand was required to interview people who had been a witness to or involved in an event under investigation.

[41] As with many of the other witnesses the ISC was frequently travelling on duty away from Auckland overseas, but some communication with her must have been possible during the investigation. Given the standards set by Air New Zealand itself for investigations, this was not a minor process defect.

[42] I find that concluding the investigation with the imposition of a final warning after a delay of 10 months is not what a fair and reasonable employer could have done in all the circumstances *at the time* the warning was delivered. Anger Management training if it was to be effective in preventing any further problems should have been required much earlier on, especially when Ms Hyland had been allowed to continue her normal work during the long period before the training was required to be undertaken by her.

### **Determination**

[43] For the above reasons the Authority determines that the action of Air New Zealand in giving Ms Hyland a final warning and instructing her to attend Anger Management was not justifiable as at 18 June 2012. On that basis she has a personal grievance.

[44] The employer's action on 18 June 2012 might have been justifiable if taken at a much earlier time, but that is not the situation the Authority has had to investigate and determine. Neither is there a question as to whether a warning less than *final*, with or without an instruction to attend Anger Management, could have been justifiable.

[45] What Air New Zealand as a fair and reasonable employer could have done in the circumstances as they were by 18 June 2012 was advised or counselled Ms Hyland about the behaviour she had admitted to, and it could have instructed her as to how she was expected to behave in future. There would have been no disadvantage to her in this and no basis for a personal grievance claim if those measures had been

taken. I have found that the company was not justified in punishing or disadvantaging Ms Hyland in her employment for what by 18 June had become historical misconduct. Her performance of employment in the period up to then demonstrated that trust and confidence had not been undermined by her conduct of 10 months earlier, and a final warning about that conduct was not justified.

### **Remedies and contributory fault of employee**

[46] Ms Hyland is entitled to a declaration that the final warning and instruction to attend Anger Management was unjustified. The warning is to be removed from her record and the instruction withdrawn. She has sought \$10,000 as compensation but in my view this is not a case for anything more than a nominal award at best. While Ms Hyland suffered hurt feelings and humiliation that was at the time the incident occurred and in having to passenger back from San Francisco, long before there were grounds for a personal grievance.

[47] There is also the fact that Ms Hyland was significantly to blame for what happened through her over-reaction and in handling her colleague. She has conceded that touching her colleague was not appropriate, and neither was the manner in which she berated her colleague while they were on duty. These were blameworthy actions and they were causally linked to the employer's action of giving a final warning and instruction to attend Anger Management training.

[48] Ms Hyland also contributed to the delay in finalising the investigation by rejecting or deferring dates proposed by Air New Zealand for various meetings, but that conduct does not seem to have been regarded as blameworthy and the airline instead of instructing her, as it could have done, to attend on the dates required or take the consequences if she did not, simply allowed her to put off the meetings, thereby adding to the delay.

[49] In the circumstances I consider there should not be any award of compensation under s 123(1)(c)(i) of the Act. No remuneration was lost by Ms Hyland.

### **Apology**

[50] I direct that Ms Hyland is to sign the letter of apology she has already drafted and given to Ms Eppingstall for her colleague to receive. The written apology is then to be forwarded by Air New Zealand to that flight attendant. It will be for her to

decide whether the remorse and contrition expressed in it is genuine and sincere. The apology given spontaneously by Ms Hyland during the flight and close to the time the initial incident occurred, may have been more meaningful than a written one given now, nearly 20 months later.

### **For further consideration by the employer**

[51] There is some irony in the fact that the disciplinary investigation and consequences flowed from the allegation of inappropriate physical conduct, as well as other behaviour by Ms Hyland towards her colleague, when it was a degree of physical contact by the latter with the former that seems to have given rise to the problem. This is a situation where for health and safety reasons a worker is permitted to sleep in the workplace. If Ms Hyland had consented to being touched as a way of waking her up it would seem to have been implied consent only, so it is in the interests of employer and employees to be clear about what method is appropriate and safe to use when cabin crew occupying a rest facility in flight have to be woken up. Air New Zealand will have ready access to knowledge and advice in the field of aviation medicine, particularly in relation to studies of what happens to aircraft crew who sleep for short periods while at work in a relatively confined space moving at high speed for 12 hours or so across international time zones. Although there is a conflict of evidence as to what exactly was done to Ms Hyland to wake her up, it is apparent that she was quite disturbed and agitated by the experience, whether that was the fault of her colleague or was some phenomenon of human science she may have had no control over.

### **Costs**

[52] Costs are reserved. If the parties do not agree to letting costs lie where they fall, as may seem appropriate, an application by Ms Hyland is to be made in writing within 14 days of the date of this determination, with a reply from Air New Zealand to be provided within a further 14 days.

